

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, :
: 11-CR-371 (KAM)
:
v. :
: 225 Cadman Plaza East
FRANKLIN GILLESPIE, :
: Brooklyn, New York
:
Defendant. : September 3, 2014
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TRANSCRIPT OF CIVIL CAUSE FOR VIOLATION OF PROBATION
BEFORE THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government: UNITED STATES ATTORNEY'S OFFICE
BY: LAUREN ELBERT, ESQ.
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201-1820

For the Defendant: KANNAN SUNDARAM, ESQ.

Court Transcriber: SHARI RIEMER, CET-805
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript
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1 (Proceedings began at 3:08 p.m.)

2 (Microphones not working properly)

3 THE CLERK: Criminal Cause for Violation of
4 Probation, Case No. 11-CR-371, United States v. Franklin
5 Gillespie.

6 Counsel, name for the record.

7 MS. ELBERT: Good afternoon, Your Honor. Lauren
8 Elbert for the United States and with me from the Probation
9 Department is Probation Officer Lee Kwak.

10 THE COURT: Good afternoon to you both.

11 MR. SUNDARAM: Kannan Sundaram, Federal Defenders
12 for Mr. Gillespie. Good afternoon.

13 THE COURT: Good afternoon. You're Mr. Gillespie?

14 THE DEFENDANT: Correct.

15 THE COURT: Good afternoon, sir. Mr. Gillespie,
16 you're here because the probation department has accused you
17 of violating the conditions of your supervised release. The
18 charges are written down in a report and I think there's a
19 supplement to the report. That's two separate documents.
20 Have you had a chance to read those and review them with your
21 attorney?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand what you're accused of?

24 THE DEFENDANT: Yes.

25 THE COURT: You're not to answer to the charges

1 today. I want to make sure you understand your rights. First
2 of all, you have the right to an attorney. Do you understand
3 that? Yes?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: As he did in the original case Mr.
6 Sundaram has been appointed to represent you. Have you had a
7 chance to meet with him and discuss the case?

8 THE DEFENDANT: Yes.

9 THE COURT: You also have the right not to make any
10 statements. I don't know if you've said anything so far. If
11 you have you don't need to continue if you don't want to. If
12 you decide later you do wish to say something you can stop any
13 time you'd like. What you must understand is that anything
14 you do say can be used against you. Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you have, folks, a date to appear
17 before Judge Matsumoto?

18 MS. ELBERT: We do. September 15th at 10:30.

19 THE COURT: What if anything have you [inaudible]
20 with respect to release and conditions?

21 MS. ELBERT: Your Honor, the Probation Department and
22 the Government have a different view as to an appropriate way
23 forward as far as his release. From the Government's
24 perspective he's been on electronic monitoring with a curfew.
25 I think between now and September 15th I agree with defense

1 counsel that it would be appropriate to place him on house
2 arrest with electronic monitoring, get rid of the curfew
3 [inaudible] home without him having advanced authorization
4 from the Probation Department. In the Government's view he
5 doesn't pose a likely risk of flight but the Probation
6 Department I understand has a different view [inaudible] give
7 them an opportunity to put that on the record.

8 MR. KWAK: Your Honor, basically he's only been on
9 supervision for over a month now. He has two very serious
10 arrests in that time. He has been on house arrest with us for
11 that time and in the violation report he's already had both
12 [inaudible] issues as far as [inaudible]. So so far with
13 [inaudible] has not been ideal [inaudible] house arrest
14 [inaudible].

15 THE COURT: Mr. Sundaram, do you wish to be heard?
16 Do you wish to be heard on this?

17 MR. SUNDARAM: Yes, Your Honor. I share the
18 Government's view. I spoke to the AUSA about the case and Mr.
19 Gillespie's situation and I'm asking that the court release
20 Mr. Gillespie on a personal recognizance bond with the
21 condition that his curfew -- I'm proposing with the Government
22 that he not have any curfew and that he simply be confined to
23 home detention. We acknowledge and I think he's acknowledged
24 with his probation officer of his actual probation officer
25 [inaudible]. I think the probation officer before the court

1 is not his actual probation officer. He's filling in for him
2 today but Mr. Gillespie has addressed some of those issues
3 with his probation office. He's acknowledged that he took a
4 number of unauthorized leaves from his house literally to go
5 outside and smoke. He also did have some arguments with a
6 young woman he was in some sort of a relationship with and
7 that was -- that also [inaudible] for some of the absences
8 [inaudible] not been -- since his most recent arrest he has
9 not left his home.

10 He also has a -- he has worked during some of this
11 brief of period doing construction. His probation officer is
12 aware of that. He has pay stubs at home that would also
13 corroborate that. He -- currently he has actually secured a
14 job painting. This is with his father who works in that
15 business. It would be 12 hours a day, not necessarily every
16 day of the week. It wouldn't be on weekends. It would be 12
17 p.m. to 12 a.m. His probation officer, Mr. Emrick [Ph.], was
18 -- Mr. Gillespie was awaiting his probation officer, Mr.
19 Emrick, to confirm with his father or whoever he'd be working
20 with the hours of -- to make any necessary adjustments in his
21 curfew but the only request we would have is that he be
22 allowed to have the curfew be set.

23 If the court grants our request then we would ask
24 that the probation officer, the Probation Department have the
25 authority to adjust that condition to allow him to work on

1 making whatever inquiry that they make. If the court needs I
2 can also address the charges to the extent I've been able to.

3 THE COURT: I will want you to. First a question to
4 Officer Kwak. Your position is that after consulting with
5 Officer Emrick or have you had a chance to do that?

6 MR. KWAK: I spoke with the supervisor.

7 THE COURT: I'm happy to hear from everybody about
8 this but there are two aspects in particular that are a
9 concern to me. One is that to the extent the proposal would
10 be changing it from curfew to essentially home detention, home
11 confinement, it's not simply that he disregarded the
12 requirement to stay in his home during the period when he's
13 supposed to but that one of the allegations, a more serious
14 offense takes place during one of those periods of departure
15 and then the second frankly a much greater concern is last
16 week or the week before he had a loaded gun and -- if that's
17 in dispute I'd like to know that. If it's not I want to know
18 the circumstances. What's he doing with a loaded gun?

19 MR. SUNDARAM: First, it is in dispute. Just to give
20 the court a little more factual information about the status
21 of that so called case.

22 THE COURT: Well, it is a case.

23 MR. SUNDARAM: It's not a case.

24 THE COURT: It's not a case?

25 MR. SUNDARAM: He was -- it's been dismissed by the

1 NYPD.

2 THE COURT: So it's a case it's just no longer active
3 or no longer pending.

4 MR. SUNDARAM: Well --

5 THE COURT: Are you saying he wasn't actually
6 arrested?

7 MR. SUNDARAM: No, he was arrested and then what
8 happened in this -- and I'm not faulting anybody here. I mean
9 this report was filed. At the time it was filed the
10 expectation was that he was going to be in custody until he
11 faced arraignment but what actually happened is he was
12 arrested on August 26th. He was at the precinct over night.
13 The next morning he was released by the NYPD and the case was
14 dismissed by them. So there is no active case. There's no
15 court case whatsoever.

16 THE COURT: Okay. I have --

17 MR. SUNDARAM: We're not saying he wasn't arrested.
18 We're saying the case is dismissed.

19 THE COURT: Okay. But what happened? Was he
20 carrying a firearm?

21 MR. SUNDARAM: He was not. The gun was not on his
22 person. Of course --

23 THE COURT: Where was it?

24 MR. SUNDARAM: It was -- where he was arrested you'll
25 notice from the information we have is the address where he

1 lives. He was outside with a large group of people. It was
2 his brother's birthday. There was a cookout. That's why he
3 was -- he agrees that he was not supposed to be out because it
4 was past 7:00. He was outside attending with some 40 other
5 people. I have -- I'm not saying that I've been able to
6 investigate this with outside sources at this point. I'm just
7 reporting what the circumstances of the possession charge
8 would have been. There was no gun found on his person. The
9 police searched many people including my client. They did not
10 find a gun on his person. There was a gun recovered from
11 outside somewhere. They charged him with it and then they
12 released him.

13 THE COURT: The report I have is that an officer --
14 the arresting officer frisked your client and found a loaded
15 firearm. You're saying that's not true.

16 MR. SUNDARAM: That's correct, that's not true.

17 THE COURT: What, if anything, can the Probation
18 Department or the Government tell me about that?

19 MR. KWAK: Your Honor, this is only from the arrest
20 report I received. I'm not sure if Officer Emrick has
21 interviewed the arresting officer as of yet.

22 THE COURT: Ms. Elbert.

23 MS. ELBERT: I have no additional information at this
24 time.

25 THE COURT: Mr. Sundaram, what do you want to tell me

1 about the earlier assault charge that is alleged to have
2 occurred during these periods when he left his home when he
3 wasn't supposed to?

4 MR. SUNDARAM: Again, I think Mr. Gillespie is not
5 denying a curfew violation or a home detention violation.

6 THE COURT: Right. But I'm concerned about what he
7 did during that curfew violation that speaks --

8 MR. SUNDARAM: I understand.

9 THE COURT: [Inaudible] violence that is of great
10 concern.

11 MR. SUNDARAM: Well, as he -- he's denying the
12 substance of those charges. He's denying the assault charge.
13 With respect to -- what we do know about the case is this. He
14 was released on his own recognizance. I've confirmed this by
15 looking up that arraignment I understand that that doesn't
16 [inaudible] --

17 THE COURT: Mr. Sundaram, you know that that's not at
18 all what I'm asking about. I'm asking about what happened,
19 not whether he was released because I'm making the decision on
20 release.

21 MR. SUNDARAM: What happened is he's denying that he
22 committed an assault. He's denying --

23 THE COURT: What happened in the incident for which
24 he was arrested? What's his version of the events?

25 [Pause in proceedings.]

1 THE DEFENDANT: Basically what happened was she saw
2 me with another girl. We started arguing and whatever the
3 case may be. She strikes my face. I hold her and then them
4 two started fighting. Them two girls started fighting, the
5 one I was with and her got into a fight and then she went and
6 said that I did something to her. That's what happened
7 because she's saying that she didn't even say it. Right now
8 it's a whole issue. She gave me the papers saying that she
9 did not press charges or a bunch of things going on with that.
10 I got her name but I don't know her number by heart.

11 MR. SUNDARAM: Your Honor, the other thing that I
12 think -- with respect to some of these absences from his home,
13 from his home that he discussed with his probation officer
14 when he was having this argument with the same person those
15 were like literally outside his home in the early morning
16 hours. So what's happening is --

17 THE COURT: What does that matter? He's not supposed
18 to be outside and he repeatedly -- he hasn't been on
19 supervised release very long. Time after time after time he
20 just didn't [inaudible] requirements are.

21 MR. SUNDARAM: Because [inaudible] responded to Your
22 Honor's question about what happened and what he's saying
23 happened. I'm saying it's just relevant that she's coming to
24 his house at three in the morning and arguing with him and
25 fighting with him. He's not -- he hasn't -- basically she's

1 falsely accusing him.

2 THE COURT: And these multiple violations of the
3 curfew? I mean look, you're asking me to say here's a guy who
4 leaves his home time after time after time when he's not
5 supposed to and what you want me to do is send him back to his
6 home. What's going to be different?

7 MR. SUNDARAM: What's going to be different is we
8 don't have a long history here since he was released.

9 THE COURT: And it all points in one direction. That
10 is my concern.

11 MR. SUNDARAM: But if you break down that small
12 period of time, since I think August 27th -- August 26th when he
13 left the home and was arrested by the NYPD he has not left the
14 home for any reason. The woman who he was involved with who
15 was coming to his home before making noise, pounding on the
16 door three in the morning, he lives with his grandmother. He
17 would step out of the house. She would say go talk to her,
18 don't bring this into my house, and that situation isn't
19 happening any more. She's not coming by any more. He's not
20 going to -- he has not left his house since August 26th. He
21 has addressed the issue with his probation officer and he's
22 been on this with his probation officer and telling him,
23 admitting that he did leave the house a few times. You'll
24 notice many of the absences were eight to fifteen minutes and
25 that's when he was out smoking.

1 THE COURT: So it's okay to leave the home for 15
2 minutes because he's smoking?

3 MR. SUNDARAM: No, I'm just saying that he has --
4 we're not saying it's okay. We're saying that he addressed
5 that with his probation officer and he stopped doing that.

6 THE COURT: The -- this is a honest -- it's not a
7 pointed question at all. I honestly [inaudible]. It's your
8 burden because it's a supervised release violation to show
9 clear and convincing -- by clear and convincing standard that
10 this will alleviate the risk to the community and the risk of
11 flight; correct?

12 MR. SUNDARAM: Yes.

13 THE COURT: You agree with that?

14 MS. ELBERT: Yes.

15 THE COURT: What am I missing that you're seeing?
16 Because I have a great concern even if the standard were as it
17 is in a pretrial context I have a great concern and I'm
18 absolutely not seeing how what Mr. Sundaram is telling me
19 meets the high burden. So what am I missing that you're
20 seeing in agreeing to continuing him [inaudible] today?

21 MS. ELBERT: Sure. I think for Your Honor obviously
22 there are two separate issues, the issue of the violation
23 itself and the appropriate punishment for the violation and
24 the issue of whether it's appropriate that he be remanded
25 pending the resolution of the violation. I agree that the

1 allegations are serious.

2 However, as Mr. Sundaram pointed out even though
3 he's been non compliant with the curfew periodically it has
4 been for a few minutes at a time. This is something that we
5 see a lot. It does not indicate to me somebody who is going
6 to shirk his responsibilities and not appear in court for the
7 resolution of the violation. So to me not that that's not a
8 serious violation but it's not the kind of non compliance that
9 gives me pause that he's not going to appear in court for the
10 next [inaudible].

11 In terms of the allegations relating to the new
12 arrest, as Mr. Sundaram stated, the gun charge was dismissed.
13 I don't have any additional information on that but based on
14 the dismissal I don't think that I can really rely on that to
15 argue that the defendant poses a risk to the community. We're
16 not withdrawing the charge. I just --

17 THE COURT: So you believe that there's a basis to
18 have his -- have him -- convicted is not the right word. But
19 there's a basis for a charge that he violated the conditions
20 of the supervised release by virtue of possessing a loaded
21 firearm but a charge that you have to prove. So you think you
22 can establish that charge but you also think that the fact
23 that it was dismissed in the state court means that
24 [inaudible] by clear and convincing evidence that he's not a
25 danger to the community for possessing the same loaded firearm

1 [inaudible]. I don't understand the logic.

2 MS. ELBERT: Your Honor, I think that at the time
3 these allegations were launched that charge had not been
4 dismissed. I do not have any information about why it was
5 dismissed. I have not personally spoken to the officer. This
6 is not my case. I just am standing up on it as of an hour
7 ago. But based on the fact it was dismissed I don't think
8 it's fair to me to assert that he presents a danger to the
9 community when I have no additional information other than the
10 fact that he was arrested.

11 THE COURT: I don't want to discourage you from doing
12 something that you think is fair. I think it's absolutely the
13 right thing to do but frankly I wholly disagree. I think that
14 there's -- it may be, Mr. Gillespie, you are a very, very
15 unlucky man and that you keep finding yourself in situations
16 where somebody wrongly accuses you of assault and somebody
17 else wrongly has a gun and a cop wrongly thinks it's found on
18 your person but you're not convincing me by clear and
19 convincing evidence that there's not a risk to the community.

20 MR. SUNDARAM: I'm sorry, Judge. There is actually
21 one significant fact that I think speaks to concerns about
22 risk of flight that [inaudible] omitted and forgot to get to.

23 THE COURT: Okay.

24 MR. SUNDARAM: Is with respect to this, him coming
25 appearing before the court today, the first -- he was

1 contacted by the police officer, Officer Emrick, the day
2 before yesterday he received a text message to call him and
3 then he called him and they spoke and he was told -- he was
4 directed to appear today at the Probation Office at 9:30 in
5 the morning and he understood this was in the context of what
6 had been happening with the arrest. He understood that he was
7 going to be facing violation charges. He did appear at 9:30
8 in the morning to probation. This is not a situation where he
9 knew about the charges and wasn't coming. It was not a
10 situation where they just showed up at his house at six in the
11 morning as is often the case for arrest and it's a situation
12 where they told him to come in and he did. So I think it's
13 tantamount to turning himself in which I think does address
14 concerns about the risk of flight.

15 THE COURT: I would not enter a permanent order of
16 detention based solely on risk of flight but I am very
17 concerned about danger to the community and you haven't
18 persuaded me that I shouldn't have that concern. So I'm going
19 to enter a permanent order of detention.

20 MR. SUNDARAM: Your Honor, that will be with leave to
21 make a bail application?

22 THE COURT: You can make any application you like but
23 I'm making the finding that no condition or combination of
24 conditions based on the record that's been presented to me
25 would alleviate the risk of danger to the community and

1 [inaudible]. By all means you have the Government on your
2 side here. So seek review of this decision. I have to give
3 you my best decision which is I don't think you have
4 demonstrated by clear and convincing evidence that there's not
5 a risk of danger to the community where the Government is
6 continuing to press the charge that your client had a loaded
7 firearm that was found on a frisk of his person and that he
8 committed an assault of somebody who ended up with -- I lost
9 my place in the report but with demonstrable and noticeable
10 injuries to her person committed while he left his apartment
11 during the time when he was supposed to be staying in the
12 apartment.

13 So I don't have a record on which I think consistent
14 with the Bail Reform Act I can lawfully release your client
15 and I don't think different bail conditions would change that.
16 So that's my decision. You are of course free to seek review.
17 I encourage you to do it.

18 Anything else for today?

19 MS. ELBERT: No, Your Honor.

20 MR. SUNDARAM: Nothing.

21 (Proceedings concluded at 3:28 p.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer, CET-805

7 Dated: September 15, 2014
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